Supreme Court, U.S.
FILED
04-10-19 NOV 23 2004

No._____

IN THE SUPREME COURT OF THE UNITED STATES

GURMEET SINGH DHINSA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For The Second Circuit
(2nd Circuit No. 04-0427)

Circuit Court Judges: Cabranes, Straub and Wesley

PETITION FOR WRIT OF CERTIORARI

BARRY A. KOZYRA, ESQ.
Counsel of Record and On the Brief
RAJ GADHOK, ESQ.
On the Brief
KOZYRA & HARTZ, LLC
Attorneys for Petitioner
140 Eagle Rock Avenue
Roseland, New Jersey 07068
973-403-8344
973-403-9652 (Telefacsimile)

QUESTIONS PRESENTED

1. Was it error for the United States District Court and Court of Appeals to deny Mr. Dhinsa's right to due process of law in failing to consider his original petition's filing date (before another District Court) in satisfaction of the AEDPA's statute of limitations as provided by 28 U.S.C. §2255, dismissing the petition without any adjudication on the merits, and denying Mr. Dhinsa a certificate of appealability?

2. Did the United States District Court and Court of Appeals commit error in treating Mr. Dhinsa's timely filed application before another District Court as "dismissed" when application of 28 U.S.C. §1631 required the courts to consider the petition as "transferred" with a timely filing date?

LIST OF PARTIES

All Parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, issued on August 26, 2004, is unreported (A-1 to A-2). The decision of the United States District Court for the Eastern District of New York, issued on December 31, 2003, is unreported (A-3 to A-7). The Judgment of the District Court was entered on January 6, 2004 (A-8). The decision of the United States District Court for the Central District of California, issued on October 2, 2002, is unreported (A-9 to A-12). The Judgment of the District Court was entered on October 2, 2002 (A-13).

JURISDICTION

This petition for a writ of certiorari is filed within 90 days from the Judgment of the United States Court of Appeals for the Second Circuit. 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime ... nor be deprived of life, liberty, or property, without due process of law ...

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

United States Code, Title 28

§2241. Power to Grant Writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions ...

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(d) Where an application for a writ of habeas corpus is made by a person in custody ... the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§2255. Federal Custody; Remedies on Motion Attacking Sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... or

is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –
(1) the date on which the judgment of conviction becomes final ...
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

§1631. Transfer to Cure Want of Jurisdiction.
Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is notice for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been

> brought at the time it was filed or noticed, and the action or appeal shall proceed as if it has been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

STATEMENT OF THE CASE

Mr. Dhinsa seeks habeas corpus relief pursuant to 28 U.S.C. §2255 from his conviction and sentence imposed by the United States District Court for the Eastern District of New York, dated November 5, 1999. Mr. Dhinsa was tried on a 29-count indictment, including charges of murder, and convicted on twenty counts following an eight-week jury trial. On appeal to the Second Circuit Court of Appeals, three of the more serious counts were reversed due to the District Court's erroneous rulings, and the case was remanded for a new trial on those counts. The Government chose not to re-prosecute.

Mr. Dhinsa retained new legal counsel, Barry A. Kozyra, Esq., on or about February 15, 2002, to review the trial materials for the possibility of any available post-conviction remedies. Mr. Dhinsa was then incarcerated in the Federal prison in Lompoc, California, and direct communication was limited.

Mr. Kozyra completed his review and evaluation of the trial materials and spoke with Mr. Dhinsa and asked preliminary questions in or about May 2002. A review of the entire transcript together with Mr. Dhinsa's telephone interview revealed he was never instructed by his trial attorney or the District Court of his constitutional right to

testify in his own behalf.

Mr. Kozyra subsequently visited with Mr. Dhinsa and obtained a Certification regarding his trial on or about September 7, 2002 (A-22 to A-25). At that time, Mr. Kozyra also learned that Mr. Dhinsa's trial counsel failed to call several key witnesses to testify despite specific instruction to do so. Thus, Mr. Dhinsa was also deprived of his constitutional right to produce witnesses in his favor. Mr. Dhinsa was not aware that his rights had been violated until consulting with and being questioned by Mr. Kozyra.

Denial of Mr. Dhinsa's Constitutional Rights During Trial Court Proceedings

Mr. Dhinsa is a United States resident alien with no educated familiarity with the American legal system's workings (A-22 to A-25). Substantially all evidence produced at trial concerning the murder offenses was circumstantial in nature and based on the testimony of witnesses with substantial credibility issues including motivation to escape the death penalty (A-29 to A-34). Throughout trial, Mr. Dhinsa repeatedly stressed to his lead defense counsel, Gerry L. Shargel, Esq., his desire to testify so as to challenge the testimony of the Government's witnesses as to his alleged involvement in the charged murders, and also sought to introduce further affirmative evidence of his innocence (A-22 to A-25).

Defense counsel proceeded through trial and closed without calling Mr. Dhinsa as a witness, nor did he call the other witnesses whom Mr. Dhinsa believed could testify favorably. Due to the District Court's initial instruction to

direct all communications through defense counsel, Mr. Dhinsa remained silent as he did not believe it was his decision and constitutional right to speak up or testify in his own behalf. He further believed that he could not address his wishes to the District Court, unless his defense counsel agreed. Mr. Dhinsa was never asked by the District Court if he wished to testify on his own behalf (A-22 to A-25).

If he had been given the opportunity, Mr. Dhinsa would have testified and produced evidence that he was neither involved in the conspiracy to murder nor the murders themselves. He would have testified and produced evidence that he did not know any of the victims nor did he have any disputes with any of the victims, in direct contradiction to trial testimony. Further, Mr. Dhinsa would have testified and produced evidence that he was not present at the scene of any of the aforementioned criminal acts, in direct contradiction to trial testimony (A-22 to A-25).

Mr. Dhinsa's Filing for Post-Conviction Relief

On September 16, 2002, a Petition for Writ of Habeas Corpus was filed on behalf of Mr. Dhinsa pursuant to 28 U.S.C. §2241 in the United States District Court for the Central District of California (A-13 to A-25).

Mr. Dhinsa challenged the legality of his conviction and sentence on the grounds that the conviction was obtained without his being properly instructed of his constitutional right to testify in his own behalf and his constitutional right to produce witnesses who would testify in his favor.

Mr. Dhinsa's petition papers were filed within the

statute of limitations set by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") – within one year of the date on which the judgment became final. Mr. Dhinsa and counsel acted with reasonable diligence in investigating the available facts, meeting together (in California), and reviewing the extensive trial record, all before filing the petition. Mr. Dhinsa's judgment of conviction had not become final until his petition for writ of certiorari was denied by the United States Supreme Court on or about October 1, 2001. A petition for writ of habeas corpus was filed less than one year later on September 16, 2002 (the "inside" filing date) in the Central District of California, where Mr. Dhinsa was then incarcerated. (He is currently incarcerated in the United States Penitentiary, Victorville, California.) Mr. Dhinsa filed the petition in the Central District of California as he is considered a resident of the district.

Upon review of the filed papers and without prior notice to defense counsel or hearing, the Central District of California Court (per the Honorable Virginia A. Phillips, U.S.D.J.) decided the application should be made as a §2255 petition and declined jurisdiction based on the fact that the "petitioner has failed to make the requisite showing that Section 2255 is an inadequate or ineffective remedy." The court expressly noted that "there is nothing ... which prevents [Mr. Dhinsa] from bringing a Section 2255 petition in the sentencing court." (A-9 to A-11). Mr. Dhinsa's petition was incorrectly "dismissed" without prejudice (instead of defense counsel being offered the choice among dismissal, amendment or transfer to the identified sentencing court) for lack of jurisdiction (A-12). The dismissal decision was not filed until October 2, 2002, and not provided to defense

counsel for Mr. Dhinsa until receipt of the Order on October 7, 2002 -- after the one year "inside" AEDPA limitation period expired (on October 1, 2002). Believing that the original September 16, 2002 filing date would be followed and that Mr. Dhinsa had until May 2003 to file his petition (the "outside" AEDPA limitations date, the habeas petition was re-filed by counsel with the Eastern District of New York under §2255 shortly thereafter on November 21, 2002 (the "outside" filing date) (A-26 to A-59).

On January 7, 2003, the Honorable Edward Korman, U.S.D.J., issued an Order to Show Cause asking the Government to file a response to Mr. Dhinsa's petition within sixty days as to why the motion should not be granted (A-60 to A-61). Over the next nine months, the Government sought repeated requests for extensions of time to file responding papers, all of which were granted (A-62 to A-74). The Government's proffered reason for the extensions was its need to obtain transcripts of a charging conference which specifically addressed one of the principal issues raised by the petition - that Mr. Dhinsa was not advised of his constitutional right to testify at his trial.

On September 22, 2003, counsel for Mr. Dhinsa received the Government's Opposition Brief to Mr. Dhinsa's petition (A-75 to A-108). In its brief, the Government failed to cite to any portion of the record, including the charging conference, in which Mr. Dhinsa's waiver of his constitutional right to testify was discussed. The Government simply concluded that "it is highly unlikely ... that Mr. Dhinsa's claims are true." (A-87 to A-88).

On September 30, 2003, Judge Korman *sua sponte*

issued a Memorandum and Order to Gerry L. Shargel, Esq. (Mr. Dhinsa's trial counsel), directing him to respond to the ineffective assistance of counsel claim (A-109). Mr. Shargel provided an affidavit, dated October 7, 2003, in which he explained that he did not have sufficient memory to refute the allegations about the conversations that Mr. Dhinsa claimed to have had with him (as stated in his §2255 petition papers) or to recall the tactical decisions made at trial, including the right of Mr. Dhinsa to testify on his own behalf (A-110 to 111).

On October 28, 2003, Judge Korman issued another *sua sponte* Order directing that Mr. Dhinsa address whether the petition should be dismissed because the Government had been prejudiced in its ability to respond due to laches (A-192). The Government had never asserted prejudice due to delay. Counsel for Mr. Dhinsa complied with the Order (A-115 to A-121).

On December 19, 2003, Judge Korman issued a third *sua sponte* request now directing that Mr. Dhinsa show cause as to why the petition should not be dismissed on the ground that it was not timely filed in the Eastern District of New York, referencing the "inside" AEDPA statute of limitations date of October 1, 2002 (A-123 to A-123). The Government had not raised the issue. The statute of limitations argument was being raised for the first time, nearly thirteen months after the application had been re-filed in the Eastern District of New York and fifteen months after the application had been filed in the Central District of California. Counsel for Mr. Dhinsa again complied with Judge Korman's Order and showed that Mr. Dhinsa's petition was timely filed for several recognized reasons (A-124 to A-132).

Counsel for Mr. Dhinsa submitted two briefs addressing all of Judge Korman's concerns, indicating that despite the filing of the petition three years after sentencing, it was filed within the prescribed AEDPA periods of limitations (A-115 to A-121; A-124 to A-132). What is more important, there was no genuine issue as to the timeliness of the original filing. Any such defect, if existing, was due to a procedural error on the part of the Central District Court of California in failing to transfer the petition rather than dismissing it without prejudice – and unwittingly failing to deliver the Order before the expiration of the "inside" AEDPA limitations date on October 1, 2002. (Moreover, Mr. Dhinsa would have had no knowledge of his post-conviction claims until May 2002, after counsel had obtained and reviewed the record. That would mean that the AEDPA "outside" statute of limitations should not have run until May 2003.)

On December 31, 2003, Judge Korman dismissed the habeas corpus petition on AEDPA statute of limitations grounds relying only on the "inside" AEDPA. Limitations date. No mention was made of the "outside" AEDPA limitations date. Judge Korman did not reference the procedural oversight of Judge Philips in not transferring the original petition from California. Judge Korman further contended (again *sua sponte*) that delay in filing the habeas petition made it impossible for the Government to reconstruct the factual circumstances underlying the petitioner's claim – even though not raised in any of the Government's papers. Judge Korman referenced the petition having been filed three years after Mr. Dhinsa was convicted and sentenced (during which time an appeal was diligently pursued). In dicta, Judge Korman also rejected a *sua sponte* application of an

"equitable tolling" argument. (A-3 to A-7).

On January 9, 2004, Mr. Dhinsa filed a timely Notice of Appeal with the Second Circuit Court of Appeals, appealing the Judgement of the Eastern District. Mr. Dhinsa filed a Motion for Issuance of a Certificate of Appealablity, pursuant to 28 U.S.C. §2253(c), on March 31, 2004. The motion and appeal were denied by the Second Circuit on August 26, 2004 (A-1 to A-2).

REASONS FOR GRANTING THE WRIT

The United States Supreme Court has jurisdiction under 28 U.S.C. §1254(1) to review, on a petition for writ of certiorari, a denial of an application for a certificate of appealability under the AEDPA by a circuit judge or panel of the Court of Appeals. See Hohn v. United States, 524 U.S. 236, 253 (1998); see also Castro v. United States, 540 U.S. 375 (2003).

Mr. Dhinsa has raised valid and substantial claims about the denial of his constitutional rights concerning denial of his right to testify and to call witnesses in his own behalf which affected the outcome of his trial and require further factual inquiry. Certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751 (1983)(*citing* Wainwright v. Sykes, 433 U.S. 72, 93, n.1 (1977)). Concerning such decisions, an attorney must both consult with the defendant and obtain consent to the

recommended course of action. Failure to do so constitutes ineffective assistance of counsel and the denial of due process of law. However, Mr. Dhinsa has no prospect of ever having his constitutional claims addressed because the courts below have wrongfully dismissed his petition without consideration of the facts and the relevant statutory and case law.

Despite the compelling circumstances set forth by Mr. Dhinsa, the courts below have refused to issue a certificate of appealability. In order for a COA to issue, the petitioner need not show that the accused should prevail on the merits; instead, he need only demonstrate: (1) that the issues are debatable among jurists of reason; (2) that a court could resolve the issues in a different manner; or (3) that the questions are adequate as to deserve encouragement to proceed further. See Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

In Slack v. McDaniel, 529 U.S. 473, 484 (2000), the Supreme Court set forth the standard for a certificate of appealability to issue when a habeas corpus petition has been dismissed on procedural grounds. A COA must issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and ... jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. at 484. Mr. Dhinsa has made both showings.

Mr. Dhinsa's petition was timely filed under the "inside" AEDPA limitations date of October 1, 2002, as well as the "outside" AEDPA limitations date in May 2003. At a minimum, "jurists of reason" would find – and have found –

these issues "debatable" warranting review of Mr. Dhinsa's circumstances.

ARGUMENT

I. THE COURTS BELOW ERRED IN DENIAL OF MR. DHINSA'S RIGHT TO DUE PROCESS OF LAW BY FAILING TO CONSIDER AND ADHERE TO THE ORIGINAL FILING DATE OF THE CALIFORNIA HABEAS PETITION OR, IN THE ALTERNATIVE, RECOGNIZING MR. DHINSA'S REASONABLE DILIGENCE IN FILING THE NEW YORK PETITION.

The AEDPA imposes a one-year statute of limitations in which habeas corpus relief may be sought from a federal conviction under §2255. See 28 U.S.C. §2255. The one-year period begins to run from the latest of four possible dates, two of which are relevant here: (1) the date on which the judgment of conviction becomes final under §2255(1); and (2) the date on which the facts supporting the claim presented could have been discovered through the exercise of due diligence under §2255(4). The District Court dismissed Mr. Dhinsa's petition *sua sponte* on the basis that his conviction became final on October 1, 2001, holding that his petition which was filed with the Eastern District on November 21, 2002, was untimely under §2255(1). To do so, the District Court had to deliberately ignore relevant procedural history and facts which contradicted its finding.

Firstly, Mr. Dhinsa disputes that controlling date which should be considered for statute of limitations purpose is November 21, 2002 (the second filing date – in the Eastern

District of New York). Rather, the filing of the first petition - September 16, 2002 (in the Central District of California) - should be treated as the controlling date which satisfies the "inside" statute of limitations date (A-13). Secondly, Mr. Dhinsa's petition was still timely filed – even using the November 21, 2002 filing date – under §2255(4) because he (and his counsel) could not have discovered the facts supporting his claim until May 2002 when collateral issues were recognized by Mr. Dhinsa to exist making the "outside" AEDPA filing date in May 2003.

A. The AEDPA Statute of Limitations Did Not Begin To Run Until Mr. Dhinsa Had An Opportunity To Discuss His Trial Proceedings With His Attorney.

An accused is not held to the same standards of legal knowledge as an attorney. The Court observed in Powell v. Alabama, 287 U.S. 45 (1932), that a layman defendant "requires the guiding hand of counsel at every step in the proceedings against him." Id. at 69 (*emphasis added*). The Court further stated, id.:

> If charged with a crime, [the defendant] is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one.

Since collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize errors and to evaluate counsel's professional performance. See Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) *(citing* Powell, 287 U.S. at 69). Consequently, a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults a different lawyer about his case. The accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings. See id. at 104-105 (*citing* Price v. Johnson, 334 U.S. 266, 291 (1948)).

Other circuit courts have applied the same reasoning to an ineffective assistance claim in conjunction with the right to (or to refuse to) testify. In Flanagan v. Johnson, 154 F.3d 196 (5th Cir. 1998), the factual predicate of the prisoner's claim was that he was called to testify and did not know, because trial counsel did not inform him, that he had the right to refuse to testify. The Fifth Circuit held that the AEDPA's statute of limitations began to run only upon the prisoner's learning about his valuable legal right. The Flanagan court relied upon an affidavit submitted by the petitioner twenty-one months after the conviction and sentence became final in reasoning that this was an acceptable period of delay. See id. at 199. In the eyes of the Flanagan court, the statute of limitations began to run only upon submission of the affidavit, twenty-one months after the conviction and sentence became final.

Despite supporting case law recognizing the importance of preserving a petitioner's right to habeas corpus relief, the court below failed to allow a review of the merits of Mr. Dhinsa's application. Mr. Dhinsa was never instructed by his trial attorney or by the District Court of his constitutional right to testify in his own behalf. (In contrast to the few seconds of court time this would have taken are the many questions and answers elicited on knowingly waiving the same right to testify when a plea of guilty is entered.) Indeed, even the Government thought that this key right was addressed by the District Court (at a charging conference) during the four-month long trial – it was not. Counsel's failure to call several key witnesses to testify or present evidence at Mr. Dhinsa's request, deprived him of his constitutional right to produce witnesses in his favor and of effective assistance of counsel (A-21 to A-24).

Mr. Dhinsa was not aware that his constitutional rights had been violated until consulting with his new counsel in May 2002. (Representation did not commence until February 2002.) He did not learn that it was his constitutional right to testify in his own behalf or to call witnesses and present evidence on his own behalf at trial until then. The one-year AEDPA statute of limitations could not begin to run until May 2002 – the accrual date for the application of the one-year limitations period in §2255(4). The purpose of §2255(4) is to allow a petitioner to obtain new counsel for a careful review of the facts and proceedings below to see if there were errors to be reviewed. One year is allowed - and needed - when a record is as substantial as the one below and the accused incarcerated especially when across the country. (The courts below gave no consideration to the May 2002 accrual date at all.)

On the facts, Mr. Dhinsa's habeas petition would not have been time barred until May 2003. The District Court's *sua sponte* dismissal of the petition on limitations grounds without addressing all issues or holding a plenary hearing was wrong.

B. Mr. Dhinsa Acted With Reasonable Diligence In Investigating The Facts And Reviewing The Trial Proceedings Before Filing His Habeas Petition.

The District Court found that the Government had been prejudiced by the delay in the filing of Mr. Dhinsa's habeas petition (A-3 to A-7). The Government has never alleged that it has been prejudiced by any delay on the part of Mr. Dhinsa or his counsel. In truth, the Government has not been prejudiced by any action and/or inaction on the part of Mr. Dhinsa in addressing the issues to be raised.

Rule 9(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides:

> *Delayed petitions*. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant show that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

28 U.S.C.A. foll. §2255. A respondent seeking to dismiss a

habeas petition under Rule 9(a) faces a "heavy burden" in proving a laches defense. See Dumas v. Kelly, 105 F.Supp.2d 66, 69-70 (E.D.N.Y. 2000)(*citing* Hughes v. Irvin, 967 F.Supp. 775, 779 (E.D.N.Y. 1997)). The respondent must: (1) make a particularized showing of prejudice, (2) show that the prejudice was caused by the petitioner having filed a late petition, and (3) that the petitioner has not acted with reasonable diligence as a matter of law. If the respondent fails to establish any one of these elements, its Rule 9(a) motion fails. See id. With respect to the first prong of the Rule 9(a) dismissal analysis, prejudice to the Government may not be merely presumed from the absence of a transcript or of witnesses necessary to recount the details of a proceeding. See Cotto v. Lord, 2001 WL 21246 at 6 (S.D.N.Y. 2001) (A-133 to A-168). The Government must actually be disadvantaged by the absence of such resources in responding to the particular allegations or theories asserted by the petitioner as grounds for habeas corpus. See id.

The Government has not demonstrated any showing of prejudice as required by law - nor could any be found. Full transcripts from the trial proceedings are available for the Government's and the Court's review - just as they are to Mr. Dhinsa's new counsel. In fact, the Government delayed its response to the petition for nearly ten months as it presumably conducted a review of the trial transcripts to establish that Mr. Dhinsa had knowingly waived his constitutional right to testify (A-62 to A-74). That Government claim was without merit.

To merely "assume" that the Government is prejudiced (as was done by the District Court) because of trial counsel's absence of recollection as to whether he

advised Mr. Dhinsa of his constitutional right to testify is far too speculative to warrant dismissal of the petition. Defense counsel did not refuse to provide an affidavit so as to create an adverse inference as to Mr. Dhinsa's allegations: he admitted having no recollection of any such discussion (A-110 to A-111). The affidavit adds nothing to support an argument that the Government has been prejudiced. If anything, it corroborates Mr. Dhinsa's recollection that he was prejudiced at trial because the issue was not addressed with him by counsel or the District Court.

"If the respondent fails to make the required showing of prejudice, it is irrelevant whether the petitioner was diligent or not in filing his habeas petition." Dumas v. Kelly, 105 F. Supp.2d 66, 70 (E.D.N.Y. 2000)(*citing* Smith v. Duckworth, 910 F.2d 1492, 1496 (7th Cir. 1990). However, assuming that the Government is able to satisfy the prejudice prong under the Rule 9(a) dismissal analysis, it must still show that the prejudice was caused by the petitioner having filed a late petition. The Government must prove that the prejudice was caused by the petitioner's undue delay itself, and not the mere passage of time alone. See Quinones v. Miller, 2003 WL 21276429 at 23 (S.D.N.Y. 2003)(*quoting* Pacheco v. Artuz, 2001 WL 1134864 at 4 (S.D.N.Y. 2001))(A-169 to A-329).

Mr. Dhinsa acted with reasonable diligence by securing new counsel, investigating the facts, meeting with counsel and reviewing the extensive trial transcript before filing the current petition. Mr. Dhinsa's judgment of conviction did not become final until his petition for writ of certiorari was denied by the United States Supreme Court on October 1, 2001. His petition for writ of habeas corpus was

filed on September 16, 2002 in the Central District of California (A-13) satisfying the "inside" AEDPA filing date requirement. The petition was dismissed without prejudice on jurisdictional grounds and re-filed by Mr. Dhinsa's counsel in the Eastern District of New York on or about November 18, 2002 (A-26 to A-28) satisfying the "outside" AEDPA limitations date requirement. It cannot reasonably be argued that the petitioner is responsible for any undue prejudicial delay as he has diligently pursued the appellate and post-conviction relief options available to him under the law. (Moreover, the District Court cannot genuinely rely upon an undue delay supposition where the Government was responsible for nearly ten months of that delay.)

The Second Circuit previously addressed the issue of what constitutes a reasonable passage of time in assessing a late-filed habeas petition. In Wims v. United States, 225 F.3d 186 (2d Cir. 2000), the petitioner moved to vacate a drug conspiracy conviction seventeen months after it became final, claiming ineffective assistance of counsel. Wims argued that his petition was timely under §2255(4) because, unbeknownst to him, his attorney had failed to file a direct appeal. See id. at 188. The issue was whether the due diligence language of §2255(4) required Wims to have checked on his counsel's pursuit of an appeal on the very day that his conviction became final, or whether it was reasonable for him to have waited five months to do so. See id. at 189-91. Wims did not realize that he had a potential ineffective assistance of counsel claim until a detailed post-sentence conversation with his new lawyer five months after the conviction became final. The Second Circuit held that a determination of when the limitations clock under §2255(4) begins to run is fact-specific and should be based on the

particular circumstances of each case. See id. at 190-91. In doing so, the Court recognized that a five-month delay was not so unreasonable as to render the petition *per se* untimely.

Similarly, Mr. Dhinsa's application should not have been regarded as *per se* untimely. His original petition filing date was within the AEDPA statute of limitations. The subsequently filed petition was filed just several weeks following counsel's notice of dismissal of the original petition. It was treated by the District Court and the Government as a timely filing for more than one year. Thereafter, without conducting an evidentiary hearing, the District Court *sua sponte* dismissed Mr. Dhinsa's petition finding that the AEDPA limitations date was not tolled by the California filing (without any further consideration of the timely California filing and the absence of a required transfer order) and automatically denied a certificate of appealability. The District Court's decision was an abuse of discretion and fatal to Mr. Dhinsa's gaining an opportunity to review the deprivation of his constitutional rights to effective assistance of counsel and due process of law.

II. THE COURTS BELOW ERRED IN FAILING TO ACKNOWLEDGE THAT MR. DHINSA'S ORIGINAL PETITION WAS TIMELY FILED AND SHOULD HAVE BEEN TRANSFERRED TO NEW YORK AND THAT THE TIMELINESS OF THE RE-FILED PETITION "RELATES BACK" TO THE ORIGINAL FILING DATE.

The District Court never addressed Mr. Dhinsa's principal argument, that the filing date of his second petition relates back to his first filing date, and instead offered legal theories directed at dismissing the petition which were not advanced by the Government or Mr. Dhinsa. This unusual judicial activism had the capacity to and did, in fact, prejudice Mr. Dhinsa.

A. The Courts Below Failed To Address The Fact That The Petition Filed In California Should Have Been Transferred to New York.

The federal statute governing habeas corpus petitions provides that "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. §2241(a). The Order issued by Virginia A. Phillips, in the Central District of California, declined consideration of Mr. Dhinsa's writ by stating that jurisdiction would be better in the Eastern District of New York (even though Mr. Dhinsa is present within the territorial jurisdiction of the Central District of California) citing to the "burden" of hearing such a habeas corpus application where there was available "the more convenient jurisdiction of the sentencing court." (A-9 to A-11).

Once Judge Phillips concluded that the federal court in the Eastern District of New York had jurisdiction over the application under §2255, federal law mandated transfer to that court, not dismissal of the petition. (The Government has conceded that the petition should have been transferred by Judge Phillips.) Judge Phillips' express recognition of the availability of relief in the Eastern District was designed to leave an open door for Mr. Dhinsa to seek legal relief – not an opportunity for Judge Korman to close it. Judge Phillips could not have meant to prejudice Mr. Dhinsa by failing to transfer the case and having the Order delivered after the AEDPA's one year filing deadline. (Ironically, Judge Phillips' Order has a box checked "Priority.") (A-9). The laws and rules which are designed to provide justice cannot be so mechanically applied. The Federal Rules of Civil Procedure expressly recognize the means for assuring justice and should have been followed in form and substance.

> Whenever a civil action is filed in a court ... and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action ... to any other such court in which the action or appeal could have been brought at the time it was filed or noticed ...

28 U.S.C. §1631. In Miller v. Hambrick, 905 F.2d 259 (9th Cir. 1990), the Court of Appeals for the Ninth Circuit stated:

> [T]ransfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is "time-consuming and justice defeating." ... [This

> approach] was adapted to habeas corpus in applying 28 U.S.C. §2241(d), the provision to habeas corpus in a State which contains two or more judicial districts ... Now under 28 U.S.C. §1631 the same approach can be taken generally in habeas corpus proceedings ...

Id. at 262 (*quoting* Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467 (1962)). More recently, in Cruz-Aguilera v. INS, 245 F.3d 1070 (9th Cir. 2001), the Ninth Circuit cited the Miller language and added that "because the statute's language is mandatory, federal courts should consider transfer without motion by the parties." Id. at 1073-74.

Transfer to the district court of appropriate jurisdiction is required if the following conditions are met: (1) the transferring court lacks jurisdiction, (2) the transferee court could have exercised jurisdiction at the time the action was filed, and (3) the transfer is in the interest of justice. See id. All three conditions have been met as (1) Judge Phillips has dismissed the petition for lack of jurisdiction, (2) the Eastern District of New York could have exercised jurisdiction at the time the petition was filed on September 16, 2002, and (3) it is clearly "in the interest of justice" to preserve Mr. Dhinsa's right to habeas relief from dismissal for being untimely where the petitioner failed to receive Judge Phillips' notice of the dismissal until after the expiration of the statute of limitations under the AEDPA. Mr. Dhinsa's counsel provided the courts below with extensive briefing on the transfer issue as well as emphasizing that neither Mr. Dhinsa nor his counsel were ever provided with notice that the petition was being viewed as a §2255 motion. If so, Mr. Dhinsa would have consented

to the recharacterization and transfer rather than risk dismissal due to a statute of limitations issue.

Various courts in the Second Circuit have expressly recognized the importance of protecting a petitioner's habeas rights when faced with strikingly similar circumstances. In Moore v. White, 188 F.Supp.2d 411 (S.D.N.Y. 2002), the petitioner filed a petition for writ of habeas corpus pursuant to §2241 in the United States District Court of Connecticut. The Moore Court found that the petition would have been properly brought by motion before the court where the petitioner was sentenced, pursuant to §2255. The Court concluded that it would be "in the interest of justice" to transfer the petition to the Northern District of New York under 28 U.S.C. §1631 for consideration as a §2255 motion. See id. at 413. (While the Court eventually held that the petitioner was procedurally barred from pursuing relief under §2255, it was because her original §2241 petition was filed more than four months following the expiration of the one year limitation period set forth by the AEDPA.[1] The latter holding would not apply as Mr. Dhinsa's petition was his first and clearly filed within the one year time period permitted.)

In addition to statutory law, Second Circuit case law identifies the proper procedure in these circumstances. Prior to recharacterizing a §2241 petition as a first §2255 motion,

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[1] In Bostic v. Williamson, 2004 WL 2271386 (W.D.N.Y.) (A-330 to A-339), the petitioner's §2241 petition was similarly dismissed on the grounds that if it was converted to a motion under §2255, it would be untimely.

the court must permit the petitioner either to: (1) agree to the recharacterization of the petition as a §2255 motion, with the understanding that the matter will be transferred to the sentencing court; or (2) withdraw the petition "rather than have it so recharacterized." Adams v. United States, 155 F.3d 582, 584 (2d Cir. 1998); see also Castro v. United States, 540 U.S. 375, 124 S.Ct. 786, 792 (2003), a case decided just weeks before the trial court's *sua sponte* ruling and not referred to in that decision (agreeing with circuits that have adopted this warning procedure before characterizing a §2241 petition as a first §2255 petition).

There have been several recent decisions which involve issues which are nearly identical to the case *sub judice*. In Diaz v. Deboo, 2004 WL 1944021 (D.Conn.) (A-340 to A-344), the petitioner challenged her conviction by means of a §2241 petition filed in the district of incarceration. The court noted that the petitioner's claims were more appropriately raised in a §2255 motion. See id. at 2. The petitioner had never previously filed a §2255 motion challenging her conviction. Although it appeared as though the statute of limitations set forth by the AEDPA had run, the court noted that "there are exceptions to the statute of limitations." Id. Since the motion would have been the petitioner's first §2255 motion, the court followed the framework in Adams and allowed the petitioner three weeks to file a notice in which she either (1) agreed to recharacterize her petition as a §2255 motion and allow transfer to the sentencing court (ironically, the Eastern District of New York); or (2) withdraw the petition rather than have it recharacterized as a §2255 filing. The court further held that if the petitioner failed to respond, it would automatically recharacterize the petition as a §2255 filing and

transfer it to the sentencing court. See id. Dismissal was not an option.

In Rogers v. Deboo, 2004 WL 1497541 (D.Conn.) (A-345 to A-349), the petitioner also challenged her conviction in by filing for relief pursuant to §2241. The court again noted that the petitioner's claims were more appropriately raised in a §2255 motion. See id. at 2. Despite the fact that she was convicted approximately fourteen years earlier, the court concluded that §2255 relief was still available to the petitioner. "In the interests of justice," the court transferred the case to the district court where the petitioner was convicted "for whatever action the court deems appropriate." Id. (*citing* 28 U.S.C. §1406(a))(permitting a district court, in the interest of justice, to transfer a case to a district in which it could have been brought).

Due to a procedural or administrative oversight on the part of the California District Court, an error which the Government has since acknowledged but the courts below have refused to address and correct, Mr. Dhinsa is severely prejudiced by reason of dismissal of his habeas petition. For reasons unknown, both District Courts failed to apply or recognize the mandatory federal transfer procedure recognized by §1631 or case law despite the fact that this was an issue thoroughly briefed on behalf of Mr. Dhinsa (in New York) (A-124 to A-132). Jurists of reason would find the rulings of the courts below debatable in light of §1631 and the supporting case law. It is submitted that the decisions were just plain wrong and should be reversed.

B. The Habeas Petition Re-Filed in New York Is Entitled To Be Considered To "Relate Back" To The Timely Filed Initial Petition In California.

The courts below also failed to consider the "relation back" doctrine. In Zarvela v. Artuz, 254 F.2d 374 (2d Cir. 2001), the court examined the effect of a dismissal of a habeas petition without prejudice when a subsequently filed petition would be regarded as untimely. Zarvela filed a habeas petition which included a number of claims, several of which were unexhausted at the appellate level. Since the unexhausted claims could not be reviewed as part of a habeas petition, the Court sought to dismiss these claims as part of the petition, while preserving the remaining claims for habeas review. The Court dismissed the unexhausted claims and remanded the remainder of the petition with the instruction that the district court had the discretion to either stay further proceedings on the remaining portion of the petition, or to dismiss the petition in its entirety, but observed that a stay would be the appropriate course in cases where an outright dismissal could jeopardize the timeliness of a collateral attack. Pursuant to Fed.R.Civ.P. 15(c)(2), a habeas petitioner, like any civil litigant, is entitled to amend his petition, and an amendment will "relate back" to the date of his original petition if the added claim "arose out of the conduct, transaction, or occurrence set forth" originally. See id. at 382 (*citing* Fama v. Commissioner of Correctional Services, 235 F.3d 804 (2d Cir. 2000)). The Court noted that because the petitioner's initial filed petition was timely and should have been stayed, subject to appropriate conditions, the initial petition should be considered on its merits. See id. at 383.

The "relation back" doctrine applies with equal force to Mr. Dhinsa. Judge Phillips dismissed a timely filed petition for habeas corpus in California and stated that the petitioner could seek relief in the Eastern District of New York (A-9 to A-11). However, that later petition became automatically untimely because the first Court served its decision on counsel late. It is under these exact circumstances that the Federal Rules of Civil Procedure and case law require a transfer of the petition – to avoid the very type of injustice being delivered here. Jurists of reason would again find the rulings of the courts below debatable in light of the failure to apply, or even consider, the "relation back" doctrine. Mr. Dhinsa is entitled to review of the decisions of the lower courts.

CONCLUSION

For all of the reasons set forth herein, this Court should issue a Writ of Certiorari to review and reverse the decision of the United States Court of Appeals for the Second Circuit and the decision of the Eastern District of New York with the matter being remanded for an evidentiary hearing on the merits of Mr. Dhinsa's claims. In the alternative, the Writ of Certiorari should issue and the matter should be remanded to the lower courts for further consideration and an evidentiary hearing on the merits of Mr. Dhinsa's claims.

Respectfully submitted,
Attorneys for Petitioner,
Gurmeet Singh Dhinsa

BARRY A. KOZYRA, ESQ.

Dated: January 20, 2005